

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Leased Commercial Access

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MB Docket No. 07-42

COMMENTS OF
THE BROADBAND SERVICE PROVIDERS ASSOCIATION
IN SUPPORT OF NCTA'S REQUEST FOR STAY

Association

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Dated: April 11, 2008

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The Broadband Service Providers Association (“BSPA”)¹ hereby submits these comments in support of the National Cable and Telecommunications Association’s (“NCTA”) Request for Stay (“Request”) filed with the Federal Communications Commission (“Commission” or “FCC”) in the above-captioned proceeding.² As demonstrated in NCTA’s Request, a stay pending judicial review is warranted in this case, because NCTA is likely to prevail on the merits, and a denial of the Request would result in substantial and irreparable harm to cable operators and be contrary to the public interest.

BSPA and its members have made rate calculations based on the FCC’s new marginal implicit fee rate formula for leased access programming. Similar to the

¹ The current members of BSPA, all of which are last-mile, facilities-based providers, are: Hiawatha Broadband, Knology, RCN, and SureWest Communications.

² *In the Matter of Leased Commercial Access, Report and Order and Further Notice of Proposed Rulemaking*, MB Dkt. No. 07-42, FCC 07-208 (rel. Feb. 1, 2008)(“*Order*”).

findings of Comcast, Cablevision, and Time Warner,³ the BSPA members' leased access rate calculations under the FCC's new formula have resulted in a zero or near-zero rate for many of our members' cable systems. We assume that the FCC did not anticipate or intend this result.

Section 612 of the Communications Act of 1934, as amended, directs the Commission to prescribe rules that establish the "price, terms and conditions" for leased access, but in a manner that is "sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."⁴ In this case, the FCC has adopted a new leased access rate formula that results in a zero or near-zero rate for many of the BSPA members' cable systems and at least several of the large MSOs. Clearly, the FCC's new rate formula is in contravention of the statutory mandate of Section 612. By prescribing a rate formula that results in a zero or near-zero rate, the FCC is forcing cable operators to subsidize leased access programming and absorb the losses associated with such a rate. Moreover, a zero or near-zero leased access rate can be predicted to result in a flood of leased access programming not only from the bona fide programmers the FCC seeks to enable, but others who come into the market simply to take advantage of obtaining access to highly valuable infrastructure for free. This, in turn, would likely disrupt the current programming line-ups of affected cable operators, displacing more desirable programming that consumers desire.

³ See NCTA Request for Stay, Exhibits 1-3.

⁴ 47 U.S.C. § 532(c)(1).

Such results are particularly detrimental to competitive overbuilders, such as BSPA's members, whose programming flexibility is contractually constrained and who do not have the deep pockets to support these consequences.

In addition, as demonstrated in NCTA's request, the FCC failed to explain or justify on the record its reasoning for prescribing a new leased access rate that is a distinct departure from legal precedent on this issue, mandates free carriage for programmers on commercial cable systems, and results in other potential detrimental impacts.⁵ As a consequence, the new rules are arbitrary and capricious, and, therefore, NCTA is likely to prevail on the merits of its appeal.

As demonstrated here and in the record, if cable operators are required to use the FCC's new marginal implicit fee formula for leased access, they will suffer substantial and irreparable harm. This harm is particularly significant for competitive entrants in the cable market. It is contrary to the public interest to mandate a leased access rate that can undermine competition in the cable market by adversely impacting the financial conditions and operations of competitive overbuilders.

WHEREFORE, the BSPA urges the Commission to grant NCTA's Request for Stay pending judicial review, where, as demonstrated in the record, NCTA is likely to prevail on the merits, the harm to cable operators is substantial and irreparable, and a grant is in the public interest.

⁵ NCTA Request at 6-9.

Respectfully submitted,

**Broadband Services Providers
Association**

By: /s/
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2008, a copy of the foregoing Comments of The Broadband Service Providers Association was served via electronic mail on each of the persons listed on the attached service list.

/s/
John D. Goodman

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